

ADDENDUM

**Subject Attorneys' Comments and/or Objections to
the Report Pursuant to the Court's Order, dated
February 8, 2012**

Exhibit 3

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March 8, 2012

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In Re Special Proceedings, Misc. No. 09-0198 (EGS)
Addendum to Report to Emmet G. Sullivan Conducted Pursuant to the
Court's Order, dated April 7, 2009

Dear Hank:

By the Order of Judge Sullivan dated February 8, 2012, we are submitting our comments and objections to the report prepared for Judge Sullivan in the investigation arising from the trial of Sen. Stevens (hereinafter the "Report"). We understand that you concluded that Nick Marsh's conduct in these matters (and the conduct of all the other prosecutors involved) did not warrant criminal charges. Nonetheless, the Report is highly critical of Marsh in a manner that is profoundly unfair and contrary to the evidence gathered during your investigation. Our comments and objections concern two issues discussed at length in the Report:

- The prosecution's failure to identify as Brady or Giglio material Bill Allen's April 15, 2008 statement during an interview by prosecutors that he had no recollection of speaking with Bob Persons about a 2002 handwritten note from Senator Stevens to Persons requesting that VECO bill Stevens for work on Stevens' chalet in Girdwood, Alaska. This statement contradicted Allen's subsequent disclosure and trial testimony that he not only recalled discussing the note with Persons, but also that Persons had described the note as an effort by Senator Stevens to "cover his ass."
- With respect to the portion of the Brady letters discussing allegations that Bill Allen had encouraged Bambi Tyree to submit an affidavit falsely denying a sexual relationship with Allen, the failure to include in the Brady letters any specific mention of an FD-302 interview report of the 2004 Bambi Tyree



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interview, the FBI agent's notes taken during the interview, or a court filing by Alaska Assistant U.S. Attorney Frank Russo. The September 2008 Brady letter disclosed an allegation that Allen had caused Tyree to submit a false affidavit but did not identify any supporting documents; instead, the letter stated that there was no evidence to support a suggestion that Bill Allen solicited Tyree to execute a false affidavit or statement.

We object strongly to the manner in which the Report singles out Marsh (as well as other subordinate prosecutors) for criticism, despite overwhelming evidence that, in each instance, the conduct that you criticize was carefully reviewed, endlessly discussed, and approved (or specifically directed) by Marsh's superiors. To be sure, you acknowledge that **"the role of the 'front office' in the management of the prosecution contributed to the failures of effective supervision of the trial team by the leadership of the Public Integrity Section** (Report at 506). However, as the evidence makes clear, the problems in these two matters for which Marsh is singled out arose not from a mere failure of supervision, or, as you put it, an "abdication" [of] any meaningful supervisory role; rather, the mistakes flowed directly from the very specific decisions and explicit directions that the supervisors gave. For reasons we simply cannot fathom, you appear to have accepted at face value the self-serving and exculpatory statements from Marsh's supervisors that they knew little or did nothing, despite ample, contemporaneous documentary evidence that, in each case, they carefully reviewed background documents, discussed options, analyzed drafts of letters and statements, and specifically approved or explicitly directed the actions that Marsh and others finally took. (Report at 507). The facts leave no doubt that the decisions that you criticize were the product of a group decision, guided by supervisors. The best that can be said for your findings is that they turn the concept of accountability upside down.

Based upon the evidence that we were permitted to review, we think it absolutely clear that Marsh acted at all times in good faith, with no intent to mislead counsel for Sen. Stevens and no effort to avoid his ethical obligations. We agree that there is much to criticize about the conduct of the DOJ in this matter; but we categorically reject your effort to lay primary responsibility at the feet of Marsh and other junior attorneys and to suggest, as you do, that the supervisors' failings were merely sins of omission and failures of management. The Report's conclusions are contrary to the evidence and offensive to basic concepts of fairness and accountability.

Finally, we strongly object to representations to the Court indicating that Marsh was provided with "open file" discovery. Declaration of Henry F. Schuelke, III dated February 8, 2012. That is most certainly not the case. Marsh was not provided with a complete copy of



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the investigative files developed by Janis, Schuelke & Wechsler. Despite our specific requests, he was denied access to the statements of other witnesses and to the full documentary record, including very many emails and notes to which he was not directly a party, but which may bear directly on his responsibility for the matters at issue. Particularly in this case, where we will never have any opportunity to test the Report's conclusions through the adversary process, this shortcoming is no small thing. Perhaps we are the only ones who do not appreciate the irony that Marsh has been accused of failing to fulfill his obligation to share exculpatory evidence through a process in which the basic protections of discovery have not been afforded to him. At a minimum, we ask that you correct your misleading suggestion that we have been provided with "open file" discovery. While we believe that the comments and objections we set forth below raise serious and substantial questions, our response remains the product only of what we were permitted to see, and not the whole record.¹

I. The Torricelli Note

We understand your concern regarding the so-called Torricelli Note to arise from the failure of the prosecution to disclose statements by Bill Allen on April 15, 2008, in which he professed not to recall having discussed the note with Bob Persons. In a subsequent interview, in September 2008, Allen instead recalled that he and Persons discussed that the Note was an effort by Sen. Stevens to "cover his ass." By virtue of this later statement, Allen's earlier failure of recollection should have been disclosed as Brady or Giglio material.

We do not disagree that Allen's earlier statement should have been disclosed. However, we believe that the evidence demonstrates that Marsh did not play any culpable role in the prosecution's failure to make a timely disclosure in this instance. Marsh was not physically present when Allen made the April 15, 2008 statement, he played no role in the failure of the FBI to record those statements in a 302, and he was not present when Allen later contradicted these statements in September 2008. Particularly in light of the fact that Marsh was not responsible for preparing Allen for trial or for reviewing Allen's prior statements for potential Brady/Giglio disclosure, and that he was, at the time of the latter statements,

¹ It is our understanding that the restrictions you placed on the review of the record were imposed only on the subject themselves, and that you shared the entire record with the Office of Professional Responsibility of the DOJ (which, in turn, shared the evidence it collected with you). The OPR likewise refused to permit counsel for Marsh to review its file or the statements of other witnesses; moreover, it has been the position of DOJ that, because of limitations imposed by the Privacy Act, it cannot share with Marsh's counsel or his personal representative the draft report that it prepared.



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overwhelmed with other pre-trial responsibilities, the prosecution's failure to connect the dots in this instance cannot fairly be laid at his doorstep.

By way of background, the 2002 note from Senator Stevens to Robert Persons, dubbed the "Torricelli note" due to its reference to issues experienced by former U.S. Senator Torricelli, first came to the attention of the Stevens prosecution team when it was produced by the Stevens defense team in April 2008. Marsh was among the attorneys who reviewed the documents received from Williams & Connolly. Marsh Transcript (Tr.) 360:10-17; CRM MARSH 016490, 4/14/08 email to Welch, Morris, cc Sullivan. Marsh acknowledged that some of these documents had been incorporated into a memo to Barry Sabin by April 11, 2008. Marsh Tr. 377:11 – 378:8. Marsh's comment about the review on April 14, 2008 was that the documents "are generally quite good for us." On April 14, 2008, Marsh forwarded a selection of these documents to Mr. Bottini, Mr. Goeke, Mr. Sullivan, and Agent Kepner in advance of the April 15, 2008. This collection of documents included, but did not highlight or mention, the Torricelli Note (CRM MARSH 016500). CRM MARSH 016492, 4/14/08 email to Bottini, Goeke, Sullivan, Kepner.

Marsh participated in the April 15, 2008 interview of Bill Allen only by telephone, though he did not specifically recall the interview. Marsh Tr. 361:10-18. Consequently, Marsh did not recall any specific questions or answers regarding the Torricelli Note during this interview. Marsh Tr. 361:19-21. Specifically, Marsh did not recall Bill Allen stating during the interview that he could not recall discussing the Torricelli Note with Bob Persons. Marsh Tr. 364:15-22.

To be sure, although Marsh testified that he may have engaged in other tasks during the interview, Marsh did actively participate in portions of it. During the interview, Marsh sent an email to his colleagues entitled "am I pushing too hard?". CRM MARSH 000771, 4/15/08 email to Bottini, Goeke, Sullivan. Marsh did not specifically recall why he sent the email, but there is no suggestion that these discussions concerned the Torricelli Note. Rather, during the general time frame of spring 2008, Marsh recalled pushing Bill Allen hard regarding Allen's contention that he was not in a position to get VECO to issue invoices to Ted Stevens, which Marsh found hard to believe.

Marsh's scant recollection of Allen's remarks is entirely plausible in light of the absence of any documentary evidence that reflected it. For his part, Marsh did not recall taking notes of this interview and could not locate any notes he took, although it appears that the four others who, in fact, attended the interview took and kept handwritten notes. Marsh



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Tr. 365:1 – 366:12.² More importantly, it appears that the FBI did not prepare a 302 of the April 15 interview of Bill Allen. There is no suggestion, however, that Marsh played any role in this oversight. He does not know why that was not done, nor did he discuss the failure to prepare a 302 with Kepner or any of the other participants in the interview. Marsh Tr. 371:2-13. As a consequence, even if Marsh heard Allen's statements regarding the Torricelli Note, he took no notes of the interview and had no way to document or to refresh his recollection in the absence of an FBI interview memorandum as the prosecution team continued to meet with witnesses and prepare for trial.

There is also scant evidence that, with respect to Marsh's role in the investigation, the Torricelli Note played any significant role. Following the April 15 interview of Bill Allen, Marsh participated in other interviews regarding two of the notes that Stevens produced to the government, including the Torricelli Note. Marsh Tr. 390:3 – 391:13. These follow-up interviews did not explore the substance of the note, but were for the purpose of determining whether the notes were made and kept consistent with normal practice. Marsh Tr. 390:3 – 392:3. Marsh recalled that at the time, there were many events going on in the Stevens investigation, many documents that were under consideration, not just the Torricelli Note. Marsh Tr. 397:8 – 399:7. Marsh also led an interview of Bob Persons in May 2008. Marsh Tr. 399:9 – 16. Marsh does not recall discussing the Torricelli Note with his colleagues in advance of that interview. Marsh Tr. 401:7 – 10. He did not ask Persons about the note or many other matters because it became clear early in the interview that Persons was not being truthful, even about matters directly contradicted by other documentary evidence. Marsh Tr. 403:6 – 404:6.

Marsh's recollection of a September 14, 2008 de-briefing of Allen is limited to being in the offices of Dorsey & Whitney in Washington, D.C. and recalling that during the interview, he excused himself to participate in a teleconference with the Court in the Stevens case. Marsh Tr. 372:10 – 373:13. Marsh recalled learning second hand, from Bottini and Kepner, that Allen had been shown the Torricelli Note, and said he recalled discussing the note with

² Though Marsh could not recall when he searched his files for handwritten notes, or to whom he provided any notes, he recalls conducting a search and providing any handwritten notes he could locate. Marsh Tr. 367:8 – 368:2.



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Bob Persons. Marsh was also told Allen had recalled that Persons had told Allen there was no need for VECO to bill Senator Stevens for construction work because Stevens was “covering his ass” with the note, specifically with the request in that note to be billed for the work on Senator Stevens’ Girdwood residence. Marsh Tr. 374:7-13.

Marsh did not dispute that the discrepancy between Allen’s September 14, 2008, statement and his earlier statements, in April 2008, meant that the earlier statement now warranted disclosure. However, in September 2008, Marsh simply did not recall Allen had said something different about the Torricelli Note in April 2008. Marsh Tr. 374:20 – 375:11; Marsh Tr. 381:6 - 14. His failure of recollection is entirely plausible under the circumstances: Marsh had neither handwritten notes of the April 15, 2008, meeting nor a 302 prepared by the FBI to refer to or refresh his memory regarding what Allen had said previously.³ By September 2008, moreover, he was overwhelmed with other pre-trial tasks for which, unlike Allen’s testimony, he had primary responsibility.⁴

There is no evidence to suggest otherwise. Interestingly, despite the fact that the trial team exchanged a prolific number of emails concerning developments in the case, the evolution of Allen’s testimony about the Torricelli Note does not appear to have prompted a single email to or from Marsh.⁵

Marsh was clear that the failure to disclose the discrepancy between Allen’s statements on April 15 and his later statements and testimony regarding the Torricelli Note was a mistake. Nothing about the subsequent events, however, triggered Marsh’s recollection of the April 15, 2008, statements. Marsh Tr. 382:5 – 11. Rather, Marsh did not recall discussing the discovery of their handwritten notes with any of the other lawyers (Bottini, Goeke, Sullivan).

³ Marsh also disengaged from the investigation not long after this interview, between mid-May and early to mid-June 2008, for his wedding and honeymoon. Marsh Tr. 375:20 – 376:3.

⁴ Marsh was responsible for direct and cross-examinations of various trial witnesses; assisting in numerous briefs and pretrial motions and requests from Williams & Connolly; and preparing trial exhibits. Marsh Tr. 38:11 – 22; 64:1 – 22; 120:1 – 9; 389:1 – 7. He also became very involved in certain portions of the discovery process. Marsh Tr. 39:14 – 19; 40:16 – 21

⁵ In fact, Marsh noted that while this change in Allen’s recollection was good for the case regarding the “gift giving” aspect, it did not materially affect the prosecution’s “liabilities” theory, which Marsh adhered to more than some other people on the prosecution team. Marsh Tr. 374:14-19.



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Marsh Tr. 382:12 – 23. Moreover, Marsh could not recall if he was even in court when Bill Allen was cross-examined about Allen's testimony regarding Bob Persons. Marsh recalled that he might have received a "blow by blow" from others who were more focused on Allen's testimony. Report at 494-95; Marsh Tr. 384:13 – 386:5.

The Stevens prosecution team collectively failed to disclose the discrepancy between Bill Allen's April 15, 2008, statement that he could not recall discussing the Torricelli Note with Bob Persons, on one hand, and Allen's September 14, 2008 statements and trial testimony, on the other. However, the facts simply do not suggest that Nicholas Marsh improperly withheld this information from the defense in the Stevens case. To the contrary, the evidence indicates that Marsh participated in the April 15, 2008, interview only by phone, and that he had neither handwritten notes of his own nor an FBI 302 to document Allen's prior statements. Likewise, Marsh was not present when Allen recalled a conversation with Persons about the Torricelli Note and, although he became aware of this statement contemporaneously, his personal failure to identify the discrepancy was entirely understandable given his limited responsibility for Allen's testimony, the overwhelming nature of his other responsibilities, and the absence of any documentation that would have reflected the discrepancy.

II. Bambi Tyree

We understand your concerns about Bambi Tyree to arise from the July 22, 2004, interview of Ms. Tyree by FBI Agent John Eckstein and AUSA Frank Russo in which Tyree discussed, *inter alia*, an affidavit she signed falsely denying a sexual relationship with Bill Allen. The substance of this interview was reflected in a 302 prepared by Eckstein and discussed in contemporaneous filings by Russo in an unrelated matter. The legal memoranda prepared by Russo stated and the Eckstein 302 implied (as did Eckstein's handwritten notes of that interview) that Allen had caused Tyree to submit the false affidavit. Rather than disclose these documents as Brady or Giglio in the Stevens prosecution, the prosecution team – relying on advice that it solicited from the Justice Department Professional Responsibility Advisory Office ("PRAO") – raised the allegation concerning Allen in the September 9, 2008, Brady letter, but indicated that a subsequent investigation by DOJ confirmed that there was "no evidence" to support the charge.

The evidence shows that Marsh acted entirely good faith in this matter. He raised with his supervisors his concerns about the implications of the Eckstein 302 and the Russo filings in connection with other pending cases and followed their direction to raise the matter with PRAO, which was created to provide prompt, consistent advice on professional



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responsibility issues that arise within DOJ. All of the evidence suggests that Marsh was open and honest with PRAO when he, with other prosecutors, discussed the circumstances and sought PRAO's advice. Although PRAO advised Marsh and others on two separate occasions that no Brady or Giglio disclosure was necessary, Marsh and the prosecution team nevertheless concluded that the issue needed to be raised in the Brady letter. In preparing that disclosure, Marsh relied on a subsequent interview of Eckstein (directed by Marsh's supervisor) clarifying that he had not intended to suggest that Allen solicited Tyree to swear falsely. The language Marsh employed concluding that there was "no evidence" to support the allegation, likewise reviewed and approved by his supervisors, was taken directly from PRAO's written findings on the matter.

Particularly by the time the September 9 Brady letter was finalized, the evidence shows that Marsh deferred to the judgment of his superiors regarding the Tyree disclosures. Though Marsh remained extremely busy after Stevens was indicted, his role and authority were diminished within the trial team while others took a leading role in the prosecution. Report at 506; Marsh Tr. 32:13-14.⁶ The communications surrounding the drafting of the September 9, 2008 Brady letter show how Welch and Morris discussed and dictated how to make the Tyree disclosures and how the team should re-interview witnesses, and both Welch and Morris received copies of every draft that was circulated before the letter was finalized. It is equally clear that while Marsh was the scrivener who finalized the September 9 letter late that evening, others were carefully reviewing the drafts, providing supervision, directing additional efforts to gather information or conduct follow-up interviews, and forwarding the written PRAO advice from 2007, as well as the underlying documents. Report at 15-16; Report at 234 (Welch testified that he was aware of a motion *in limine* authored by Assistant United States Attorney Russo in the *Boehm* matter accusing Allen of procuring a false statement, and that he recalled discussing it with Bottini); Report at 297 (Welch testified that senior DOJ officials Friedrich and Glavin made the decision that the Justice Department would consciously avoid obtaining an Anchorage Police Department file that was believed to contain exculpatory evidence, despite clear Constitutional obligations to do so; Friedrich and Glavin denied this); Report at 308-310 (documenting that Goeke forwarded the key documents relevant to Bill Allen's alleged subornation of perjury by Bambi Tyree to the entire prosecution team, including lead prosecutor Morris and Public Integrity Chief Welch. In fact, one email indicated that Morris

⁶ Morris was put in charge of the prosecution team, Bottini was second chair, and Marsh was third chair. Though Marsh was supposed to do one of the arguments (opening or closing), that responsibility was taken away. Marsh Tr. 34:7 – 15. Marsh was supposed to cross-examine Stevens, but Morris ultimately did the cross. Marsh Tr. 39:2 – 6.



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and Welch were very focused on this issue: "Fellas – Bill [Welch] and Brenda have asked to see (1) the page of Frank [Russo]'s brief re: Bambi and Bill, and (2) a copy of the page of Frank's notes...", and another from Morris indicated that Welch was to be copied on all communications concerning Brady issues – which he was. Sullivan emailed Russo's statements in the his sealed motion in limine to Welch on multiple occasions, including March 5, 2007, and September 8, 2008, the day before the Brady letter was finalized. The evidence simply does not support the Report's strong negative focus on certain members of the trial team at the expense of others, particularly where at least three participants in the discussion of the Brady issues had substantially more experience than Marsh and exercised direct supervisory responsibility on this matter.

With the benefit of hindsight, we concur that the better course would have been to disclose the Russo filings and the Eckstein 302 and handwritten notes. But that conclusion does not mean Marsh's conduct warrants harsh criticism while others are spared. To the contrary, he was partially responsible for identifying the issue in the first instance and relied in good faith on PRAO's advice. The email communications and testimony leave no doubt that (a) the Justice Department's front office opposed disclosure of this information or any effort to obtain similar information from the Anchorage Police Department; and (b) the entire prosecution team was provided with the relevant facts, read the emails and focused on those facts, struggled to fulfill their Constitutional obligations, yet concluded the language of the Brady letter was appropriate.

By way of background, Bambi Tyree was interviewed on July 22, 2004 by Eckstein and Russo. The interview was documented in a 302 prepared by Eckstein. Marsh Deposition Ex. 10. Tyree was represented by an attorney, Sue Ellen Tater, and was incarcerated at the time in Seattle, Washington. The interview focused primarily on Tyree's sexual relations with various men, including Bill Allen. Tyree also indicated she had previously signed an affidavit, provided by Allen's attorney, in which Tyree stated she had not had sex with Allen. Tyree stated that she provided false information on the affidavit because she cared for Allen and did not want him to get in trouble. The 302 indicates that Tyree signed the affidavit at Allen's request.

Eckstein retained handwritten notes of the July 2004 Tyree interview, though he did not use those notes to prepare his 302 until three months after the interview. The handwritten notes contain many abbreviations, but in substance, the notes indicate Bambi had sex with Allen but signed an affidavit saying she had not had sex with Allen. The notes say Bambi lied in the affidavit because she didn't want to get Allen in trouble, and that Bambi signed the affidavit at Allen's request. Marsh Depo. Ex. 11.



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Russo also retained handwritten notes of the 2004 interview of Tyree. Like Eckstein's notes, Russo's notes contain numerous abbreviations, but, in substance, Russo's notes indicate that Bambi signed an affidavit stating she did not have sex with Bill Allen when she was fifteen, and that the affidavit was false. The notes then state "Lisa blackmail" and "at the request of," followed by a small notation that was scratched out, followed by the words "Bambi's idea." Marsh Depo. Ex. 17.

On July 26, 2004, four days after Russo wrote the words "Bambi's idea," Russo filed a motion *in limine*, under seal, regarding potential impeachment of Bambi Tyree in a criminal case against Josef Boehm in the United States District Court, District of Alaska. In that brief, Russo wrote that Bambi Tyree signed a false affidavit about having sex with Allen at Allen's request. Marsh Depo. Ex. 14. In subsequent briefing in the Boehm case, Russo wrote that Allen convinced Tyree to give a false statement to defend against any prospective criminal action. Marsh Depo. Ex. 15.

Marsh first became aware of the Tyree/Allen issue in fall 2007, after the criminal trial of Pete Kott and prior to the criminal trial of Vic Kohring in Alaska. Marsh Tr. 167:14-16. He believes Jim Goeke found a 302 and some notes related to this issue. Marsh Tr. 167:14-20. Marsh was concerned about the implications of the issue for the Kott and Kohring cases. He raised it promptly with Welch who concurred with the need to raise the issue with PRAO. Marsh Tr. 171:14-18. Marsh also conferred with the Alaska-based prosecutors about the case and relied on them for information, since Goeke had been counsel of record in the prior case involving Tyree.

On October 4, 2007, Marsh received a fax from Joe Bottini enclosing the Eckstein 302 of the July 2004 Tyree interview. Bottini noted on the fax cover sheet that the 302 "says that she [Tyree] signed the affidavit @ Allen's request, but doesn't say he knew it was false – the inference may be made by the way it was written though." Marsh Depo. Ex. 18. Two days later, Bottini and Goeke sent another fax to Marsh about "Tyree issues" that enclosed some of the briefing in the Boehm prosecution. *Id.*

On October 8, 2007, Bottini emailed Marsh and related some conversations that Bottini and Goeke had on October 5. Marsh Depo. Ex. 19. Bottini indicated that Goeke and he agreed the Tyree/Allen issue should be addressed with PRAO "as soon as possible." Bottini reported Goeke's concern that Russo and Eckstein "now recall that Bambi told them that Allen asked her to give the sworn statement..." Marsh responded on October 9 that Goeke had told him prior to the Kott trial that "Bambi stated in debriefs that Allen never asked her to lie/make a false statement." In short, Marsh's understanding from Jim Goeke



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prior to the Kott trial was that there were no Brady issues related to Allen, Bambi Tyree, and any alleged false statement. Marsh also noted that he and Goeke had spoken with Russo "on Thursday" about this issue, and that Russo had agreed with Goeke's recollection, though he believed one could "infer something else." Marsh further recalled that "Eckstein told Jim the same thing later Thursday" and expressed some confusion about why Russo and Eckstein's understanding could have changed over such a short period of time. *Id.* This email exchange also documents Bottini's belief that the consultation with PRAO would probably lead to some type of disclosure, such as an *in camera* submission to the court.

Marsh recalls that he and other members of the Polar Pen prosecution team discussed the Bambi Tyree/Allen issue with Bill Welch before bringing it to the attention of PRAO. Marsh Tr. 172:9-21. At Welch's direction, the prosecutors contacted PRAO on October 12, 2007. Marsh Depo. Ex. 13, 10/12/07 Assignment Sheet. Marsh believes that one or more prosecutors were on the call with him when he spoke with PRAO, though he cannot recall who else participated in the call. Marsh Tr. 172:9-10; 173:1-7. Marsh recalls a telephone call with Ruth Plagenhoef that day in which he and others disclosed what they had learned about the Tyree interview, and more generally about the facts developed on the issue of whether Allen had asked Tyree to lie in an affidavit. Marsh Tr. 187:1 – 188:7. Marsh recalled reading portions of the Eckstein 302 and Russo's notes to Plagenhoef during the conversation. Marsh Tr. 188:8-13. Though Marsh cannot recall reading the sealed briefing in the Boehm case verbatim during this call, he believes that he conveyed the substance of the briefing to PRAO. Marsh Tr. 187:10-21; 188:14 – 189:9.

Plagenhoef's handwritten notes of this call reference Goeke and Marsh, though the notes do not clearly indicate who participated in the call. Marsh Depo. Ex. 13. Plagenhoef's handwritten notes corroborate Marsh's recollection that the prosecutors discussed the Eckstein 302, the sealed briefing that referenced "whether Bambi lied," Russo's handwritten notes, and the prosecution team's interviews of Tyree's lawyer, Tyree, Eckstein, and Russo. Marsh Depo. Ex. 13; CRM MARSH 099996-7.⁷ Unlike her handwritten notes, Plagenhoef's typed summary of the October 12, 2007 does not mention the sealed briefing. However, her typed summary confirms the prosecutors told Plagenhoef about the change in Russo's statements about the Tyree interview, noting that "[a]nother AUSA who worked on the old case expressed the thought that Bambi told him that BA had in fact asked her to lie." In other words, the documents confirm that Marsh and the others on the line made a complete

⁷ Our copy of Marsh Deposition Exhibit 13 had the bottom of Plagenhoef's handwritten notes cut off; the portion that was cut off is significant because it refers to the sealed briefing.



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disclosure of the underlying facts to Plagenhoef and, in particular, advised PRAO of Russo's more recent (and less favorable) recollection that the false affidavit was Allen's idea. Welch's testimony tends to corroborate that the prosecutors would have made full disclosure of the facts. Welch testified that since he first learned of the Bambi Tyree issue in 2007, he was fully aware of the substance of Russo's statements in the sealed briefing but was under the impression that the pleadings were based on Russo's "mistaken recollection" of the interview with Tyree. Report at 322.

Nowhere in Plagenhoef's notes or typed summary did she indicate the prosecutors had come to any conclusion about the merits of the information and evidence they had uncovered. Additionally, there is no evidence that Plagenhoef communicated her advice to the prosecutors in writing. However, Plagenhoef's written summary first describes some of the facts presented by the prosecutors, then articulates the "question presented" as whether prosecutors "would have to turn over information that an AUSA thought that a person said a star witness in a case had once asked her to lie, when no evidence corroborate [sic] that information, and all the evidence they can find rebuts that information." Marsh Depo. Ex. 13 (emphasis added). In sum, the documentation of the October 2007 call to PRAO supports Marsh's recollection that the disclosure to PRAO was complete, and it documents that PRAO advised the prosecutors that there was "no evidence" to support a Brady or Giglio disclosure regarding the Tyree/Allen issue.

A document we received from the Department of Justice Office of Professional Responsibility (OPR) (but not your office) shows that Mr. Marsh advised Brenda Morris of the outcome of the PRAO call later on October 12, 2007. Marsh testified that he could not recall whether Morris was involved, though he recalled that Welch was involved in the decision to consult with PRAO. Marsh Tr. 199:1-2.

Although Plagenhoef's advice was unambiguous, Marsh nevertheless consulted PRAO again on December 20, 2007, apparently following the disclosure that a newspaper was preparing to write about the Allen-Tyree relationship. Marsh Depo. Ex. 13. PRAO's notes of the call do not indicate that any of the facts surrounding the Tyree/Allen issue had changed but do mention the possibility of a news story about the relationship. CRM115170. Pat Weiss, the PRAO lawyer who handled the December 20, 2007 call,⁸ prepared a typed summary that recounted the substance of the October 12 call, then addressed the overall relationship between Allen and Tyree. Weiss concluded that the prospect of a news story did

⁸ By this time, Plagenhoef was no longer assigned to PRAO.



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not change PRAO's previous advice: the prosecutors did not need to disclose information about Allen allegedly asking Tyree to lie in an unrelated case.⁹ We are not aware that Weiss took or kept any handwritten notes of the call, but Weiss confirmed her advice in a December 21, 2007 email to Marsh and Sullivan. Like Plagenhoef's typed summary, Weiss' December 21 email to Mr. Marsh and Mr. Sullivan that recounted the earlier contact with PRAO cited the "absence of any evidence" supporting the notion that Allen asked Tyree to lie and also stated "there is no evidence supporting the notion that CO had pressed Bambi to lie." Marsh Depo. Ex. 13, CRM115173 (emphasis added).

Mr. Marsh played a substantial role in drafting the sections of the September 9, 2008 Brady letter that addressed whether Allen had solicited Tyree to lie in a sworn affidavit. Marsh Depo. Ex. 9. From the contemporaneous record, it appears that two pieces of information played a significant role in Marsh's efforts.

First, when Marsh undertook that effort, he had additional reasons to doubt what Agent Eckstein intended in his 302. Based upon contemporaneous emails, it appears that shortly before the Brady letter was written, Welch directed that Eckstein be interviewed again concerning the matter. On September 8, 2008, Goeke wrote to Bottini, Morris, Welch, Marsh, and Sullivan. Referring to Eckstein's notes and his recent interview of Eckstein, Goeke reported: "[T]hey are ambiguous. The agent also just told me that he does not remember asking Bambi if Bill asked her [to] lie and that he doesn't think he would have asked that question because the point of the inquiry was simply whether she believed she had made a false sworn statement and Bambi did not want to talk about Allen." Marsh Depo. Ex. 20. Goeke sent this email just over three hours before Mr. Marsh forwarded an updated draft of the September 9, 2008 Brady letter. Marsh's email accompanying the draft emphasizes the significance of this new information about Eckstein's recollection, noting that he had revised it "to include the Bambi Tyree stuff we discussed earlier today." Marsh Depo. Ex. 9.

Second, on September 6, 2008, Sullivan sent an email to Morris and Marsh that forwarded Weiss' December 21, 2007 email regarding the December 2007 consultation with PRAO. CRM MARSH 029779. Therefore, the key "no evidence" language in PRAO's report

⁹ Marsh testified that Ms. Weiss' factual summary appears to have mixed up the recollection and notes of Agent Eckstein and AUSA Russo, an issue he did not note or raise with PRAO at the time. Marsh Tr. 218:9 – 221:8. The summary is otherwise consistent with Marsh's recollection of the facts and Plagenhoef's notes of the prior conversation.



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was circulated to Marsh and others within a few days of finalizing the September 9 Brady letter.

On September 7, 2008, Marsh emailed draft language regarding the Allen/Tyree issue to the entire Stevens prosecution team. Marsh Depo. Ex. 21 (final email in string). Marsh's draft language said nothing about a "suggestion" about Allen soliciting Tyree to lie or the lack of evidence of Allen's role.¹⁰ Later, on September 8, Goeke responded in a lengthy email that described his review of files related to the Boehm prosecution and contained Goeke's suggestions about additions to the Allen/Tyree disclosure. In his email, Goeke noted that the 302 of Tyree's July 22, 2004 interview had been circulated to the prosecution team the previous day (CRM022049) and described statements that Tyree's attorney made when she was interviewed and described Russo's notes of the Tyree interview. Consequently, Goeke suggested draft language to address the Tyree issue that focused on the government's re-interviews of Allen and Tyree, but did not mention the Eckstein 302, the Eckstein notes, or the sealed briefing in the Boehm case. On the morning of September 8, 2008, Bottini sent an email to the entire Stevens prosecution team, including Kepner and Joy, noting the existence of the briefing in Boehm, and Sullivan had forwarded excerpts of the Russo briefs in the Boehm case to Welch and Morris. CRM MARSH 030457.

It appears that this discussion of possible disclosures surrounding Tyree precipitated a meeting or teleconference among the prosecutors. Report at 321-23. Handwritten notes that may be in Morris's handwriting document a meeting on September 8, 2008 about the "Bambi Issue" among Morris, Welch, Marsh, and Sullivan. The notes are also consistent with Morris' September 8, 2008 request for a teleconference to discuss the Tyree issues because she "wanted to get Bill in on the conversation." CRM MARSH 30453. The notes indicate that Welch believed the team should disclose information about Tyree and Allen "b/c he doesn't want [the defendant] to go forward & frontload w/J. Sullivan;" that the disclosure should be made in a letter to Williams & Connolly (hence, not by disclosing the documents); and called for "Review of FBI/Eckstein & double-check what was said." These notes are significant because they document that Marsh's supervisors dictated how the Tyree disclosure would be made, and that Marsh's supervisors were conscious of FBI materials authored by Eckstein when they made the decision to make a letter disclosure to the defense rather than by producing the documents.

¹⁰It appears that Kepner interviewed Allen that day, and that Allen denied asking Tyree to make false statements and denied knowledge of what information Tyree had supplied to Allen's attorney. CRM MARSH 30207, 9/7/08 email attaching 9/7/08 FD-1023 of Kepner interview of Allen.



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The notes and contemporaneous emails also show that the entire team was aware of statements in a sealed brief, filed by an Assistant United States Attorney, indicated that Allen had procured a false statement from Tyree. Though Welch testified that he was told the briefing was the product of Russo's "mistaken impression," there is no doubt that Welch and Morris were (i) aware of the briefing prior to September 9, 2008 and that Russo's notes arguably contradicted the briefing; (ii) focused on the specific facts and met with the subordinate prosecutors; and, (iii) ultimately decided themselves not to produce the sealed briefing or Russo's notes, much less any other surrounding documentation. The decisions that the prosecution team made about the Tyree disclosures in the September 9 Brady letter were undoubtedly dictated by fully-informed supervisory attorneys. It is apparent from Marsh's email to the entire Stevens prosecution team, at 8:52 the evening of September 8, 2008, that his revisions to the Brady letter concerning Bambi Tyree, and the decision to make the disclosures by letter rather than by producing the underlying documents, followed the meeting about the "Bambi Issue" documented in Morris' handwritten notes and therefore reflected the informed decisions of Morris and Welch, Marsh's supervisors.

In sum, we think these conclusions follow: *First*, Marsh never sought to conceal the problems regarding Allen and Tyree; to the contrary, as soon as he became aware of them, in connection with the Kott and Kohring trials, he raised the issue with his supervisors and suggested the need for further scrutiny. *Second*, the decision to solicit advice from PRAO was entirely consistent with DOJ practice – indeed, PRAO exists precisely to address problems such as these – and, in any event, was undertaken by Marsh and others at the express direction of their supervisors. There is simply no evidence that anyone, least of all Marsh, intended this exercise to be subterfuge. *Third*, Marsh and others made a full and honest disclosure to PRAO. Whether its decision was right or wrong, there can be no suggestion that Marsh sought to conceal material information from PRAO in order to influence its conclusions. *Fourth*, although Marsh played a principal role in drafting the Allen/Tyree section of the Brady letter, the contemporaneous documents reflect that it was a group effort, subject to constant review, direction, and final approval by Marsh's supervisors. *Fifth*, the troublesome reference to "no evidence" was not crafted by Marsh (or any other member of the Stevens team), but was incorporated directly from the PRAO report and accurately, and in so many words, reports its findings. That conclusion is also supported by the interview of Eckstein shortly before the Brady letter was finalized, undertaken at Welch's direction, that had just been furnished to Marsh and others. Finally, Marsh's supervisors, not Marsh, dictated the form of the disclosure – that is, by letter rather than through disclosure of the underlying documents – at a meeting that occurred the day before the letter was finalized. The final product, for which Marsh acknowledges responsibility, manages – albeit somewhat inartfully – to alert Sen.



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Stevens' lawyers to the underlying allegation (thus facilitating a further request for supporting documents) without appearing to endorse or affirm the conclusion that Tyree stated that Allen had caused her to lie.

We agree with you that the better course would have been to disclose the underlying documents, thus avoiding the troublesome path that Marsh was forced to chart. But there is nothing in the record that suggests that Marsh should bear primary responsibility because his were the last hands to touch the Brady letter. His supervisors, who were fully informed and closely following the matter, made every critical decision and carefully reviewed the language Marsh included.

In summary, with respect to each of the situations you have asked us to address, we respectfully suggest that Nick Marsh's conduct does not warrant the harsh criticism against him in the Report. To the contrary, the evidence we have been permitted to review indicates that Marsh acted honorably and in good faith in attempting to balance his obligations to abide by the decisions of his supervisors with his duties to the Court and to Sen. Stevens.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Luskin", is positioned below the "Sincerely," text.

Robert D. Luskin